Supreme Court, U.S.
FILED

001261 JAN 31 2001

OFFICE OF THE CLERK

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

WILLIAM AND CATHERINE HOOKS, INDIVIDUALLY AND AS PARENTS AND NATURAL GUARDIANS OF CHRISTOPHER HOOKS, A MINOR,
Petitioners,

v.

CLARK COUNTY SCHOOL DISTRICT AND BRIAN CRAM, IN HIS OFFICIAL CAPACITY AS SUPERINTENDENT OF THE CLARK COUNTY SCHOOL DISTRICT,
Respondent.

On Petition for Writ of Certiorari to United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

MICHAEL P. FARRIS*
SCOTT W. SOMERVILLE
Home School Legal Defense Ass'n
One Patrick Henry Circle
Purcellville, Virginia 20132
(540) 338-5600

Counsel for Petitioner
**Counsel of Record*

6995

QUESTIONS PRESENTED

1. Can local school districts exclude home school students from participation in the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§ 1400 et seq., if the state truancy laws define home schools separately from private schools?

2. Does the exclusion of home school students from participation in IDEA in states where home schools are defined by the truancy laws as a distinct legal category violate the Equal Protection Clause since such students are allowed to participate in other states if their truancy laws define home schools as private schools?

PARTIES TO THE PROCEEDING

All parties to the proceeding are fully identified in the caption of the case. Pursuant to Supreme Court Rule 29.6, Petitioner affirms that no party to this case is a nongovernmental corporation. No private corporations are involved as parties to this litigation.

TABLE OF CONTENTS

Questions Presented ii

Parties to the Proceeding iii

Table of Contents iv

Table Of Authorities vii

Citations to Opinions and Orders 1

Jurisdiction 1

Constitutional and Statutory Provisions Involved 1

Statement of the Case 10

Argument I: The Ninth Circuit's Affirmance of a Bureaucratic Exclusion of Home SChooled Children from IDEA Eligibility Creates Conflict With Congress, This Court, and Other Circuits 12

Argument II: An Interpretation of IDEA Which Excludes Home School Students in Some States But Includes them in Others Based On the Definitional Sections in Truancy Laws Defies The Principle of Equal Protection 22

Conclusion 23

Appendix A: Ninth Circuit Opinion 1A

Appendix B: Circuit Court Opinion Denying Rehearing 16A

Appendix C: District Court Opinion Granting Summary Judgment To Respondents.....18A

Appendix D: OSEP Letter.....33A

TABLE OF AUTHORITIES

Cases

Cedar Rapids Comm. Sch. Dist. v. Garret F.,
526 U.S. 66 (1999).....14, 16, 17

Florence County Sch. Dist. Four v. Carter,
510 U.S. 7 (1993).....14, 15

Fowler v. Unified Sch. Dist. No. 259,
128 F.3d 1431 (10th Cir. 1997).....20

Hooks v. Clark County School Dist.,
228 F.3d 1026 (9th Cir. 2000).....passim

Irving Independent School Dist. v. Tatro,
468 U.S. 883 (1984).....16, 17

John T. v. Marion Ind. School Dist.,
173 F.3d 684 (8th Cir. 1999).....19

M.L.B. v. S.L.J.,
523 U.S. 420 (1998).....17

Meyer v. Nebraska,
262 U.S. 390 (1922).....17

Peter v. Wedl,
155 F.3d 992 (8th Cir. 1998).....19

Pierce v. Society of Sisters,
268 U.S. 510 (1925).....17

Plyler v. Doe,
457 U.S. 202 (1982).....22

Swanson v. Guthrie Ind. School Dist. 1-L,
135 F.3d 694 (10th Cir. 1998) 18

Zobrest v. Catalina Foothills School Dist.,
963 F.2d 1190 (9th Cir. 1992) 15, 16

Statutes

20 U.S.C. § 1400 ..... ii, 13, 14, 17

20 U.S.C. § 1401 15

20 U.S.C. § 1412 ..... 5, 17

20 U.S.C. § 1415 1

28 U.S.C. § 1254 1

28 U.S.C. § 2106 1

NRS § 394.103 9

NRS § 432B.140 ..... 9, 18

Regulations

Nevada Administrative Code § 388.300 10

Constitutional Provisions

U.S. Const. Amend. XIV, § 1 ..... ii, 1, 18, 22

CITATIONS TO OPINIONS AND ORDERS

This petition seeks review of the Ninth Circuit's decision in *Hooks v. Clark County School District, et al.*, 228 F.3d 1026 (9th Cir. 2000), filed September 21, 2000. The opinion is included as Appendix A. The Ninth Circuit rejected Petitioners request for an *en banc* hearing on November 2, 2000. The order denying rehearing is included as Appendix B. The Ninth Circuit's decision affirmed an unpublished decision of the United States District Court for Nevada, *Hooks v. Clark County School District, et al.*, Civil No. CV-S-98-41-DWH(RJJ) (D.Nev. Oct. 22, 1998) granting summary judgment for defendants. The district court's Order and Memorandum Opinion are included as Appendix C.

JURISDICTION

Pursuant to Rule 29 of the Rules of the United States Supreme Court, this Petition for Writ of Certiorari was timely filed on or before January 31, 2001. The Court's jurisdiction is invoked pursuant to 20 U.S.C. § 1415 and 28 U.S.C. §§ 1254(1) and 2106.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States
Amendment XIV, § 1

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor

shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * * * *

20 U.S.C. § 1400(c) (2000)

20 U.S.C. § 1400(c) Findings

(c) Findings. The Congress finds the following:

(1) Disability is a natural part of the human experience and in no way diminishes the right of individuals to participate in or contribute to society. Improving educational results for children with disabilities is an essential element of our national policy of ensuring equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities.
(2) Before the date of the enactment of the Education for All Handicapped Children Act of 1975 (Public Law 94-142) [enacted Nov. 29, 1975]—
    (A) the special educational needs of children with disabilities were not being fully met;
    (B) more than one-half of the children with disabilities in the United States did not receive appropriate educational services that would enable such children to have full equality of opportunity;
    (C) 1,000,000 of the children with disabilities in the United States were excluded entirely from the public school system and did not go through the educational process with their peers;
    (D) there were many children with disabilities throughout the United States participating in regular school programs whose disabilities prevented such children

from having a successful educational experience because their disabilities were undetected; and

(E) because of the lack of adequate services within the public school system, families were often forced to find services outside the public school system, often at great distance from their residence and at their own expense.

(3) Since the enactment and implementation of the Education for All Handicapped Children Act of 1975 [enacted Nov. 29, 1975], this Act [20 USCS §§ 1400 et seq.] has been successful in ensuring children with disabilities and the families of such children access to a free appropriate public education and in improving educational results for children with disabilities.

(4) However, the implementation of this Act [20 USCS §§ 1400 et seq.] has been impeded by low expectations, and an insufficient focus on applying replicable research on proven methods of teaching and learning for children with disabilities.

(5) Over 20 years of research and experience has demonstrated that the education of children with disabilities can be made more effective by-- ...

(6) While States, local educational agencies, and educational service agencies are responsible for providing an education for all children with disabilities, it is in the national interest that the Federal Government have a role in assisting State and local efforts to educate children with disabilities in order to improve results for such children and to ensure equal protection of the law....

* * * * *

20 U.S.C. § 1400(d) (2000)

20 U.S.C. § 1400(d) Purposes

(d) Purposes. The purposes of this title [20 USCS §§ 1400 et seq.] are—

(1) (A) to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living;
(B) to ensure that the rights of children with disabilities and parents of such children are protected; and
(C) to assist States, localities, educational service agencies, and Federal agencies to provide for the education of all children with disabilities;
(2) to assist States in the implementation of a statewide, comprehensive, coordinated, multidisciplinary, interagency system of early intervention services for infants and toddlers with disabilities and their families;
(3) to ensure that educators and parents have the necessary tools to improve educational results for children with disabilities by supporting systemic-change activities; coordinated research and personnel preparation; coordinated technical assistance, dissemination, and support; and technology development and media services; and
(4) to assess, and ensure the effectiveness of, efforts to educate children with disabilities.

* * * * *

20 U.S.C. § 1412(10) (2000)

20 U.S.C. § 1412(10) Children in private schools:

(A) Children enrolled in private schools by their parents.

(i) In general. To the extent consistent with the number and location of children with disabilities in the State who are enrolled by their parents in private elementary and secondary schools, provision is made for the participation of those children in the program assisted or carried out under this part [20 USCS §§ 1411 et seq.] by providing for such children special education and related services in accordance with the following requirements, unless the Secretary has arranged for services to those children under subsection (f):

(I) Amounts expended for the provision of those services by a local educational agency shall be equal to a proportionate amount of Federal funds made available under this part [20 USCS §§ 1411 et seq.].

(II) Such services may be provided to children with disabilities on the premises of private, including parochial, schools, to the extent consistent with law.

(ii) Child-find requirement. The requirements of paragraph (3) of this subsection (relating to

child find) shall apply with respect to children with disabilities in the State who are enrolled in private, including parochial, elementary and secondary schools.

* * * * *

Nev. Rev. Stat. Ann. § 392.070 (2000)

NRS § 392.070. Child receiving equivalent, approved instruction is excused from compulsory attendance; provision by school district of class, special education program or certain extracurricular activity to pupil enrolled in private school or receiving instruction at home

1. Attendance required by the provisions of NRS 392.040 must be excused when satisfactory written evidence is presented to the board of trustees of the school district in which the child resides that the child is receiving at home or in some other school equivalent instruction of the kind and amount approved by the state board.

2. The board of trustees of each school district shall provide programs of special education and related services for children who are exempt from compulsory attendance pursuant to subsection 1 and receive instruction at home. The programs of special education and related services required by this section must be made available:

   (a) Only if a child would otherwise be eligible for participation in programs of special education and related services pursuant to NRS 388.440 to 388.520, inclusive;

(b) In the same manner that the board of trustees provides, as required by 20 U.S.C. § 1412, for the participation of pupils with disabilities who are enrolled in private schools within the school district voluntarily by their parents or legal guardians; and

(c) In accordance with the same requirements set forth in 20 U.S.C. § 1412 which relate to the participation of pupils with disabilities who are enrolled in private schools within the school district voluntarily by their parents or legal guardians.

3. Except as otherwise provided in subsection 2 for programs of special education and related services, upon the request of a parent or legal guardian of a child who is enrolled in a private school or who receives instruction at home, the board of trustees of the school district in which the child resides shall authorize the child to participate in a class that is not available to the child at the private school or home school or participate in an extracurricular activity, excluding sports, at a public school within the school district if:

(a) Space for the child in the class or extracurricular activity is available; and

(b) The parent or legal guardian demonstrates to the satisfaction of the board of trustees that the child is qualified to participate in the class or extracurricular activity.

If the board of trustees of a school district authorizes a child to participate in a class or ex-

tracurricular activity, excluding sports, pursuant to this subsection, the board of trustees is not required to provide transportation for the child to attend the class or activity.

4. The board of trustees of a school district may revoke its approval for a pupil to participate in a class or extracurricular activity at a public school pursuant to subsection 3 if the board of trustees or the public school determines that the pupil has failed to comply with applicable statutes, or applicable rules and regulations of the board of trustees. If the board of trustees revokes its approval, neither the board of trustees nor the public school are liable for any damages relating to the denial of services to the pupil.

5. The programs of special education and related services required by subsection 2 may be offered at a public school or another location that is appropriate.

6. The department may adopt such regulations as are necessary for the boards of trustees of school districts to provide the programs of special education and related services required by subsection 2.

7. As used in this section, "related services" has the meaning ascribed to it in 20 U.S.C. § 1401(22).

* * * * *

Nev. Rev. Stat. Ann. § 394.103 (2000)

Nev. Rev. Stat. Ann. § 394.103 (2000)
§ 394.103. "Private schools" defined

"Private schools" means private elementary and secondary educational institutions. The term does not include a home in which instruction is provided to a child who is excused from compulsory attendance pursuant to subsection 1 of NRS 392.070.

* * * * *

Nev. Rev. Stat. Ann. § 432B.140 (2000)

§ 432B.140. Negligent treatment or maltreatment

Negligent treatment or maltreatment of a child occurs if a child has been abandoned, is without proper care, control and supervision or lacks the subsistence, education, shelter, medical care or other care necessary for the well-being of he child because of the faults or habits of the person responsible for his welfare or his neglect or refusal to provide them when able to do so.

STATEMENT OF THE CASE

In 1996, Petitioners requested federally funded speech therapy services for their son, Christopher, who is educated at home pursuant to Nevada law. The school district denied services to Christopher solely because he was home schooled. The only reason the district ever offered for denying services was that it was required to do a policy letter from the United States Office of Special Education Programs ("OSEP Letter"). *See*, U.S. Dept. of Educ., OSEP, *Policy Letter to Williams*, 18 IDELR 742 (Jan. 22, 1992).

On August 27, 1996, Christopher was assessed and determined to be eligible for speech therapy services in the Clark County School District. The district refused to provide speech services to Christopher, however, because he was being educated at home. The parents requested a due process hearing pursuant to Nevada Administrative Code § 388.300, but the district refused to provide a due process hearing and advised the parents' counsel by letter that the parents must pursue other avenues to request services from the district.

In June 1997, Petitioners filed a complaint with the Nevada Department of Education ("NDOE"), which NDOE rejected. NDOE based this rejection on the OSEP Letter. NDOE argued that it could not authorize services to children in home schools unless home schools were considered "private schools" as a matter of state law. Home schools in Nevada are statutorily distinct from "private schools."[1]

---

[1] NRS § 392.070 (home schools); NRS § 394.104 (private schools).

Christopher's parents filed this federal case in 1998, alleging a violation of federal statutory and constitutional rights. The family sought (1) declaratory relief that Christopher is entitled to receive speech therapy services; (2) reimbursement for previously provided private speech therapy services; and (3) attorney's fees. OSEP did not intervene in the case, nor did it provide any testimony in the case. The district court granted summary judgment in favor of the district.

In 1999, the Nevada Legislature amended Nevada law to specify that each school district must provide special education services to children who are taught at home. Nev. Act Chap. 606, Sec. 45 (1999) (effective July 1, 1999), codified at NRS § 392.070(2) (2000). Home schools continue to be statutorily distinct from private schools. As a result of this legislation, home schoolers in Nevada (including Christopher) now receive special education services, and Nevada school districts (including Clark County) count home educated students as "private school students" in their federal funding formulas.

Although Christopher's right to speech therapy was now assured, the Ninth Circuit determined the case was not moot because the claims for reimbursement and attorneys fees were still unresolved outstanding. The Ninth Circuit ignored the school district's previous insistence that the only reason it discriminated against home schoolers was that it was required to do so by the OSEP Letter. Instead, it framed the question as whether States have discretion under IDEA to define a "school." Having framed the question thus, the Ninth Circuit turned to Webster's definition of a "school" rather than the Nevada Legislature's 1999 enactment that required the defendant school district to provide special edu-

cation services to this handicapped child. *Hooks*, 228 F.3d at 1040.

Petitioners ask this Court to grant *certiorari* because the Ninth Circuit ruling conflicts with the clear intent of Congress, the ruling of other circuits, and every one of this Court's relevant precedents.

ARGUMENT I:

THE NINTH CIRCUIT'S AFFIRMANCE OF A BUREAUCRATIC EXCLUSION OF HOME SCHOOLED CHILDREN FROM IDEA ELIGIBILITY CREATES CONFLICT WITH CONGRESS, THIS COURT, AND OTHER CIRCUITS

United States Department of Education bureaucrats wrote a letter[2] interpreting the IDEA. Local school district bureaucrats treated the OSEP letter as a federal mandate requiring them to deny special education services to home school students. State of Nevada education bureaucrats affirmed the denial citing the federal bureaucratic mandate. Perhaps only the Ninth Circuit could uphold this sequence of blind obedience to a Washington, D.C. letter as an application of the principles of federalism.

Great questions of federalism arise when state legislatures enact laws that conflict with laws of Congress. In this case, the law of Congress regarding *special education services* is not in conflict at all with the law of Nevada regarding *special education services.* Congress has said that the goal

---

[2] OSEP Letter, *supra.*

of the IDEA is for "all children" to receive special education services.[3] During the course of this litigation, the Nevada legislature specifically enacted a provision to clarify its intent that home schooled children are to be included in the state's program for special education services.[4]

Congress and the Nevada legislature are of one mind. Home schooled children are part of the "all children" to be included in the provision for special education services.

The bureaucrats had another theory. OSEP has noticed that home schooling is treated differently by different states for the purposes of *truancy laws* or *non-public education regulatory laws*. OSEP has said that if a state's truancy law defines home schooling as a "private school" then home schoolers can participate in the federal special education program. If home schooling is defined as an independent category of instruction in the truancy law, then home schoolers are not eligible for special education services under IDEA. In either case home schooling is legal; the only difference is in the label applied.

This hyper-technical mix of "truancy law" and "special education law" has produced results that defy the clear intentions of Congress and the Nevada legislature. Home school children are ineligible for the benefits granted by special needs law if their state's truancy laws place the wrong label on them. This is utterly irrational since no State legislature intended for its truancy definitions to be the basis for special needs eligibility determination.

---

[3] 20 U.S.C. § 1400(d)(1)(C).

[4] Nev. Act Chap. 606, Sec. 45 (1999) (effective July 1, 1999), codified at NRS § 392.070(2) (2000).

The decision of the Ninth Circuit affirming bureaucratic exclusion of home schoolers from special needs services once again places this Circuit in conflict with Congress, this Court, and the other circuits on the subject of special education for non-public school children.

Congress expressly stated that the purpose of IDEA was to "assist states and localities to provide for the education of all children with disabilities."[5] This Court has refused to allow any group of children, such as religious children, to be excluded from special education services.[6] This Court has consistently construed IDEA to include handicapped children rather than exclude them.[7] This Court has refused to defer to federal administrative rulings that fundamentally clash with the law they are supposed to enforce.[8] The Ninth Circuit ruling below conflicts with the clear intent of Congress and this Court's precedents in each of these respects.

The Ninth Circuit would allow local school districts to discriminate against home schools on the grounds that this enables schools to "steer scarce educational resources toward

---

[5] 20 U.S.C. § 1400(c).

[6] *Zobrest v. Catalina Foothills School Dist.*, 509 U.S. 1 (1993).

[7] *Florence County Sch. Dist. Four v. Carter by & Through Carter*, 510 U.S. 7 (1993); *Cedar Rapids Community Sch. Dist. v. Garret F. by Charlene F.*, 526 U.S. 66 (1999).

[8] *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000); *Solid Waste Agency, Inc. v. United States Army Corps of Engineers*, 2001 U.S. LEXIS 640, 148 L. Ed. 2d 576; 69 U.S.L.W. 4048 (2001).

... qualified educational environments."[9] It is impossible to reconcile this ruling with this Court's unanimous ruling in Florence *County Sch. Dist. Four v. Carter by & Through Carter*, 510 U.S. 7 (1993), so the Ninth Circuit simply ignores it altogether. In *Carter*, parents withdrew a handicapped child from an inadequate public school program and unilaterally placed her in a private school. The local school district refused to reimburse the parents for tuition, arguing that reimbursement is never proper when the parents choose a private school that is not approved by the State or that does not comply with all of the requirements of 20 U.S.C. § 1401(a)(18).[10] This Court concluded that the important issue was whether the private education was ultimately "appropriate," not whether it had been approved by the State or met any other requirements of IDEA. The Ninth Circuit ruling cannot be reconciled with this principle.

In *Zobrest v. Catalina Foothills School Dist.*, 963 F.2d 1190 (9th Cir. 1992), the Ninth Circuit told handicapped religious children that they need not apply for federally funded special education services. That was an error which this Court promptly corrected in *Zobrest v. Catalina Foothills School Dist.*, 509 U.S. 1 (1993). Now, the Ninth Circuit says that handicapped children in home schools have no right to federally funded special education services. This is the same kind of state-sponsored discrimination as before. Only this Court can correct this new mistake.

---

[9] *Hooks*, 228 F.3d at 1043. "Qualified" cannot, in this case, refer to any suggestion that home schooling is illegal in Nevada. The Petitioners have, at all times, been teaching Christopher at home pursuant to Nevada law.

[10] *Carter*, 510 U.S. at 11.

This Court's dismissed the Establishment Clause problems in *Zobrest* because of the difference between *children* and *schools*. "The IDEA creates a neutral government program dispensing aid not to schools but to individual handicapped children."[11] It is constitutional to provide federally funded special education services to handicapped children, regardless of the schools they may attend. By contrast, in its prior ruling in *Zobrest*, the Ninth Circuit was so fixated on *schools* that it lost sight of *children*. It has done exactly the same thing here.

This Court's IDEA jurisprudence leaves no child behind. The Ninth Circuit never even cites this Court's most recent IDEA case, *Cedar Rapids Community Sch. Dist. v. Garret F. by Charlene F.*, 526 U.S. 66 (1999). In that case, this Court required a school district to provide the intensive, one-on-one nursing care that a handicapped child needed to be able to attend school, regardless of cost. The school district asked this Court to adopt a multi-factor test that would take into consideration, among other things, the cost of providing services to a handicapped child. This Court rejected that request, taking particular note of the "purposes of the IDEA."[12]

Garret F. was a logical extension of this Court's earlier ruling in *Irving Independent School Dist. v. Tatro*, 468 U.S. 883 (1984). That case, decided under the Education of the Handicapped Act ("EHA"), held that schools must provide services related to the provision of education, even when those services are medical in nature. Without the insertion of a catheter every four hours, Amber Tatro would not have been able to attend school. This Court looked to the purpose of the EHA as much as its language to determine whether

---

[11] *Zobrest*, 509 U.S. at 13.

[12] *Garrett F.*, 526 U.S. at 78.

clean intermittent catheterization was included.[13] The Ninth Circuit has ignored the purpose of the IDEA in this case.

The purpose of IDEA is to assure that "*all* children with disabilities" have access to a free appropriate public education, and to assist states and localities to "provide for the education of *all* children with disabilities."[14] The first concern of IDEA is to assure appropriate services for children in the public schools, but Congress has insisted that children in private schools get a share of federal funds. "To the extent consistent with the number and location of children with disabilities in the State who are enrolled by their parents in private elementary and secondary schools, provision is made for the participation of those children in the program assisted or carried out under this part [20 USCS §§ 1411 et seq.] by providing for such children special education and related services...."[15] If the Ninth Circuit had looked at *Garret F.*, it would have construed the term "private school" to accomplish the purpose of IDEA instead of to frustrate it.

The Ninth Circuit's error in *Zobrest* was that it tolerated discrimination against religious families. This time, the Ninth Circuit has discriminated against parents who exercise the right to direct the education of their own children, which this Court first recognized in *Meyer v. Nebraska,* 262 U.S. 390 (1922) and *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), and subsequently declared "fundamental" in *M.L.B. v. S.L.J.*, 523 U.S. 420 (1998) and *Troxel v. Granville*, 120 S.Ct. 2054 (2000).

---

[13] *Tatro*, 468 U.S. at 892.

[14] 20 U.S.C. § 1400(c) [*emphasis supplied*].

[15] 20 U.S.C. § 1412(10)(a).

The Ninth Circuit dismissed this family's effort to receive the special education services that are available for every other handicapped child in the district, whether enrolled in a public or private school, as an effort to "pick and choose" the services offered by the school district.[16] The Ninth Circuit analogizes the speech therapy in this case to school sports in *Swanson v. Guthrie Independent School Dist. 1-L*, 135 F.3d 694 (10th Cir. 1998). In that case, home schoolers claimed an Equal Protection right to play on a public school sports team. The *Swanson* court concluded that parents have no constitutional right to send their children to school on a part-time basis, and to pick and choose which courses their children will take from the public school.[17]

The Ninth Circuit is unacceptably insensitive to the difference between access to team sports, which has always been considered a "privilege" of school attendance, and speech therapy for a handicapped child. The Ninth Circuit dismisses as "picking and choosing" a benefit that every private school child in the district may claim. And the Ninth Circuit ignores the fact that parents in Nevada are under a legal duty to provide appropriate educational care for their children, and can be subject to child neglect proceedings if they fail to do so. Nev. Rev. Stat. Ann. § 432B.140 (2000). Parents cannot be prosecuted for child neglect for keeping a child off a sports team. A parent's right to direct the education of a child *is* burdened by the threat of child neglect proceedings.

The Ninth Circuit upheld intentional discrimination against the exercise of a fundamental right on the flimsiest imaginable grounds. It upheld Clark County's discrimination

---

[16] *Hooks*, 228 F.3d at 1042.

[17] *Swanson*, 135 F.3d at 700.

against these children on the grounds that such discrimination steers "scarce educational resources toward ... qualified educational environments."[18] The Nevada Legislature has rejected any such governmental interest. Not only has the right to home school been recognized as legal by the Nevada Legislature at all relevant times, since 1999 Nevada has required local school districts to provide services for all such children. This Court should take this case because the Ninth Circuit rejected the real interests of the State, as expressed by the Legislature, in favor of the *post hoc* rationalizations of local administrators laboring under the supposed mandates of Washington bureaucrats.

No other federal circuit allows local school districts to intentionally discriminate against any class of handicapped children. Several circuits have expressly thwarted efforts to do so. When a school district tried to withhold special education services from a handicapped child in Iowa because he attended St. Joseph Catholic School, the Eighth Circuit overruled the district on state law grounds. That court said, "It would be nonsensical for the Iowa legislature to require school districts to provide services to a student 'attending' nonpublic schools and, in its next breath, to allow school districts to refuse such services solely on the basis of such attendance."[19] It is just as nonsensical for Nevada to require school districts to provide services to home schools and, in its next breath, to allow school districts to refuse to pay for such services.

In *Peter v. Wedl,* 155 F.3d 992 (8th Cir. 1998), the Eighth Circuit considered a claim brought by parents of a

---

[18] *Hooks*, 228 F.3d at 1043.

[19] *John T., et al. v. Marion Independent School Dist.*, 173 F.3d 684, 688 (8th Cir. 1999).

child in a private religious school. The court noted that "Congress clearly intended [under pre-1997 IDEA] that disabled students voluntarily placed in a private school by their parents were to be active participants in and beneficiaries of programs established under the IDEA."[20] The Eighth Circuit concluded that where a school district denies a student special education services simply because he is enrolled in a private religious school, that school district violates the mandates of the pre-1997 IDEA.[21]

The Tenth Circuit construed the pre-1997 IDEA to mean that school districts were required to provide services on private school grounds whenever it was more cost effective to do so. After the 1997 amendments, of course, private school students have no individual entitlement to federally funded services.[22] The Tenth Circuit's cost analysis provides a rational basis for deciding how to administer federally funded special education services. Since 1997, local school districts are only obliged to pass a fair share of federal funds on to the handicapped children who are not in public schools. The Ninth Circuit opinion, by contrast, is no more than *post hoc* rationalization of indefensible discrimination.

While the new enactment by the Nevada legislature has reduced the issues in this case to reimbursement for past services and attorney's fees, the implications of this decision have far-reaching consequences.

---

[20] *Peter,* 155 F.3d at 1000 (internal quotations omitted).

[21] *Id.* at 1001.

[22] *Fowler v. Unified Sch. Dist. No. 259*, 128 F.3d 1431 (10th Cir. 1997).

First, there are 38 states where home schools are defined separately from private schools by the truancy law. Seven of these states are in the Ninth Circuit.[23] Home school eligibility for special education services under IDEA in these states is definitely threatened by the Ninth Circuit decision. There is additional threat for home schoolers in the balance of the nation if the Ninth Circuit's rejection of the intent of Congress and the rulings of this Court on special education spreads among bureaucratic decision-makers.

Second, the ability of the State of Nevada to receive federal reimbursement for its provision of special needs services has been placed in jeopardy as a result of the Ninth Circuit's decision. The federal government cannot tell the states that they cannot give funding for special needs programs for home schoolers. The OSEP letter proffers no such ruling. Rather, the OSEP letter discusses the eligibility under the federal program. However, eligibility runs both ways. There is student eligibility for services. And there is school district eligibility for federal reimbursement. The OSEP letter proclaims that the *sine qua non* of federal eligibility is that home schoolers must be labeled by the *truancy law* as private school students. Nevada has not changed its truancy laws in this regard. It only clarified its special education laws. Therefore, the Ninth Circuit's decision of the bureaucratic decision affects all forms of federal eligibility. It leaves Nevada's home school students ineligible for federal aid (though state aid is now secure) and threatens the eligi-

---

[23] The Ninth Circuit has two states where home schools can legally operate as private schools: Alaska, California. In the other seven states in that circuit, home schools can not legally operate as private schools. Those states are Arizona, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington.

bility of Nevada's school districts for federal reimbursement when they follow state law.

ARGUMENT II:

AN INTERPRETATION OF IDEA WHICH EXCLUDES HOME SCHOOL STUDENTS IN SOME STATES BUT INCLUDES THEM IN OTHERS BASED ON THE DEFINITIONAL SECTIONS IN TRUANCY LAWS DEFIES THE PRINCIPLE OF EQUAL PROTECTION

Finally, the Ninth Circuit's rejection of our equal protection claims is in conflict with this Court's most recent parental rights decision.[24] We contend that even under the lowest tier of equal protection analysis, the equal protection violation of allowing special education eligibility for federal law purposes to blink off and on based on the definition sections of state truancy law's is self-evident. But, a higher standard of analysis is required. Troxel makes it clear that a parent's right to direct the upbringing and education of one's children is a fundamental right.[25] Equal Protection analysis in the context of a fundamental right demands strict judicial scrutiny, not the lowest level of scrutiny afforded by the Ninth Circuit.[26]

The OSEP Letter contents that Congress used the term "private school" in the IDEA to grant special education services to home schoolers in California and Alaska but to deny such services in Arizona, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington. It is not, as the Ninth Circuit

---

[24] *Troxel v. Granville*, 120 S.Ct. 2054 (2000).
[25] *Troxel*, 120 S.Ct. at 2057.
[26] *Plyler v. Doe*, 457 U.S. 202, 216-17 (1982).

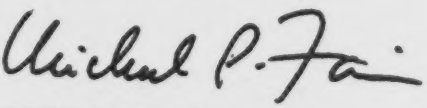
suggests, a decision that Congress intended to leave to the States. If States had such a choice, it would be exercised within the State special education law, not in the law defining truancy.

The Ninth Circuit pays lip service to federalism, but the rule it applies undermines rather than upholds self-government. In the twelve states where home schools are classified as "private schools" for purposes of the truancy laws, States have no autonomy. In the remaining thirty-eight states (including Nevada), federal courts will accept the most far-fetched rationalization of a local school district over the considered judgment of the elected representatives of the people.

CONCLUSION

For the reasons stated above, Petitioners respectfully urge this Court to grant certiorari in this case.

Respectfully Submitted,



MICHAEL P. FARRIS*
SCOTT W. SOMERVILLE
Home School Legal Defense Association
One Patrick Henry Circle
Purcellville, Virginia 20132
(540) 338-5600

Counsel for Petitioners
* *Counsel of Record*

APPENDIX

APPENDIX A:
NINTH CIRCUIT OPINION

WILLIAM and CATHERINE HOOKS, individually and as parents and natural guardians of CHRISTOPHER HOOKS, a minor, Plaintiffs-Appellants, v. CLARK COUNTY SCHOOL DISTRICT and BRIAN CRAM, in his official capacity as Superintendent of the Clark County School District, Defendants-Appellees.

No. 98-17271

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

228 F.3d 1036

April 12, 2000, Argued and Submitted, San Francisco, California

September 21, 2000, Filed

PRIOR HISTORY:
Appeal from the United States District Court for the District of Nevada. D.C. No. CV-98-00041-DWH/RJJ. David Warner Hagen, District Judge, Presiding.

DISPOSITION:
AFFIRMED in part and REMANDED.

COUNSEL:
Michael P. Farris, Purcellville, Virginia, Home School Legal Defense Association, for the plaintiffs-appellants.

Jon Okazaki, Office of General Counsel, Las Vegas, Nevada, for the defendants-appellees.

JUDGES:
Before: Alfred T. Goodwin, Melvin Brunetti, and Sidney R. Thomas, Circuit Judges. Opinion by Judge Goodwin.

OPINION:

[*1037] GOODWIN, Circuit Judge:
William and Catherine Hooks appeal the dismissal of their action against Clark County School District and its Superintendent. Their case presents novel issues regarding (1) the interpretation of the Individuals with Disabilities Education Act, *20 U.S.C. § 1400* et seq. (1996) ("IDEA"), and (2) the constitutionality of denying benefits to home-educated children. We hold that, pursuant to the IDEA, States have discretion in determining whether home education constitutes an IDEA-qualifying "private school." Further, the challenged regulatory scheme does not unconstitutionally offend equal protection principles or infringe on the parents' liberty interest in guiding their child's education.

BACKGROUND

Christopher Hooks is a child who receives his education at home from his parents. In August 1996, Christopher was **[*1038]** deemed to be medically eligible for speech therapy services. The Hooks family requested subsidized services, even though there has been no claim that home education is necessary to treat his disability, and even though Christopher was not enrolled in any school within the school district. The

school district, in accordance with its policy, opted not to provide the services.

In Nevada, children taught at home can be excused from Nevada's compulsory attendance law by receiving an exemption under Nevada Revised Statute ("NRS") 392.070 (1997) (the "home-education exemption"). Exempted educational environments avoid certain regulatory requirements imposed on institutional "private schools" in Nevada. *See, e.g.*, NRS 651.050(2)(k) (1997) (imposing requirements on "private schools"); NRS 394.251 (1997) (same); NRS 394.130 (1997) (same).

The Hooks family has applied for and received the home-education exemption since the 1994-95 school year. For the 1996-97 school year, the Hooks family requested that Christopher be exempted from Nevada's compulsory attendance law and also that he receive speech therapy services provided in Nevada's schools. As noted, the school district refused the services.

By letter in March 1997, the school district explained that the school district's Policy 5111(V) provides that, in accordance with Nevada law, students who receive the home-education exemption "do not have access to instruction and/or ancillary services with the public schools." *Id.* The school district suggested that the parents either (1) seek an exception from the Board of Trustees, or (2) enroll Christopher in the school district, where he would have an individualized education plan tailored to his needs. The Hooks family chose neither option.

Instead, in June 1997, the Hooks family filed a complaint with the Nevada Department of Education (the "NDOE"), which the NDOE rejected. The NDOE relied on a policy letter from the United States Office of Special Education Programs ("OSEP"), which declares that States have discretion to determine whether or not home education qualifies as

a "private school or facility" that implicates IDEA requirements. *See* U.S. Dept. of Educ., OSEP, *Policy Letter to Williams*, 18 IDELR 742 (Jan. 22, 1992). Because exempted home education does not qualify as a "private school" under Nevada law, NRS 394.103 (1997), the NDOE upheld the school district's policy.

In January 1998, the parents filed a federal action, alleging that the school district's policy violated the IDEA and the Fourteenth Amendment. The parents sought (1) declaratory relief that Christopher is entitled to receive speech therapy services, (2) reimbursement for the parents' payments for private speech therapy services, and (3) attorneys' fees. The district court granted summary judgment in favor of the school district, and the parents appealed. We affirm.

JURISDICTION & STANDARD OF REVIEW

We have jurisdiction to review the summary judgment pursuant to *28 U.S.C. § 1291,* and we review *de novo. See Washington v. Garrett, 10 F.3d 1421, 1428 (9th Cir. 1993).* To successfully challenge a summary judgment, the plaintiffs must point to some part of the record that demonstrates a genuine issue of material fact and, drawing all reasonable inferences in the plaintiffs' favor, could convince a reasonable [jury to find in their favor. *See* Fed. R. Civ. Proc. 56; *Celotex Corp. v. Catrett, 477 U.S. 317, 323, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986).*

DISCUSSION

I. Change in Nevada Law

After this action was commenced, the Nevada legislature amended state law to provide that "the board of trustees of [*1039] each school district shall provide programs of special education and related services for children who are exempt from compulsory attendance pursuant to the home-education exemption and receive instruction at home." Nev. Act Chap. 606, Sec. 45 (1999) (effective July 1, 1999), codified at NRS 392.070(2) (2000). Under the amended Nevada law, "related services" includes "speech-language pathology ... services." NRS 392.070(7) (2000) (referencing *20 U.S.C. § 1401*(22)).

Pursuant to this legislation, the school district concedes that it is now required to provide speech therapy to eligible home-educated children, and Christopher has been assessed and deemed eligible for speech therapy services. Thus, there is no need for us to consider whether the district court erred by refusing to enter a declaratory judgment. We remand that matter to the district court for its consideration in light of Nevada's new law.

However, neither the appeal nor the action is moot, because the new law does not resolve the reimbursement claim for the payments already made by the parents for Christopher's therapy, to which we now turn. *Cf. Capistrano Unified School Dist. v. Wartenberg, 59 F.3d 884, 890 (9th Cir. 1995)* (graduation of disabled student did not moot claims for reimbursement and attorneys' fees).

II. Statutory and Regulatory Scheme

The IDEA and accompanying regulations provide for special services for three categories of children: (1) students in public schools; (2) children placed in private schools by a public agency; and (3) children placed unilaterally in private schools by their parents. *See 20 U.S.C. § 1412*(1) (1994); *34 C.F.R. § § 300.400-300.*452 (1996); *Nieuwenhuis v. De-*

lavan-Darien School Dist., 996 F. Supp. 855, 865 (E.D. Wis. 1998). This scheme comports with the current version of the IDEA, as amended in 1997. *See 20 U.S.C. § § 1412* (1), 1412(10)(A), 1412(10)(B) (2000). Nothing in the language of the IDEA provides services for children who are not enrolled in school, however "school" is defined.

The Hooks family argues that Christopher is a child of the third category, i.e., a child placed unilaterally in private school by his parents, and thus that he qualifies for services. The regulations in effect at the time of Christopher's request provide that where "parents choose to place the child in a private school or facility," *34 C.F.R. § 300.403(a)* (1996), provision shall be made for "special education and related services of [such a] *private school child*[ ]," *34 C.F.R. § 300.452* (1996), "to the extent consistent with their number and location in the State." *Id.* (emphasis added). The amended, current version of the IDEA regarding "private elementary and secondary schools" reads in similar fashion. *See 20 U.S.C. § 1412*(10)(A)(i) (2000).

The question we confront is whether Christopher qualifies as a "private school child," i.e., a child placed in a "private school or facility." Neither the IDEA nor the regulations defines or explains what constitutes a "private school."

III. State Discretion Under the IDEA to Define "School"

The school district contends, and the district court held, that state law controls the definition of "private school" under the IDEA, and that therefore Christopher does not qualify, because exempted home education does not qualify as a "private school" in Nevada. "Private schools," under pre-1999 Nevada law, "means private elementary and secondary educational *institutions. The term does not include a home in which instruction is provided to a child excused from compulsory attendance pursuant to NRS 392.070.*" NRS 394.103

(1997) (emphasis added). Thus, Christopher does not qualify as a "private school" child under Nevada law, and thereby does not qualify for ancillary services under the school district's policy.

The Hooks family does not dispute the school district's interpretation of Nevada law, and we do not address that issue of **[*1040]** state law interpretation. Rather, the appellants contend that Nevada's definition, and by extension the school district's policy, violates the IDEA. The appellants invite us to craft our own definition of "private school or facility" and impose it upon the States from the federal level. We decline this invitation.

Instead, we hold that the IDEA leaves discretion to the States to determine that home education that is exempted from the State's compulsory attendance requirement does not constitute an IDEA-qualifying "private school or facility." In holding that this matter is left to the States, we affirm the district court.

We start with the words of the statutory and regulatory provisions. The common meaning of those words - their plain language - does not require that exempted home education qualify as a "private school or facility." A "school" can be commonly defined as an "*institution* for the instruction of children." Webster's II, New Riverside University Dictionary 1045 (1994) (emphasis added); and an "institution" can be commonly defined as an "established organization or foundation, especially one dedicated to public service." *Id.* at 633; *cf.* Black's Law Dictionary 800, 1344 (6th ed. 1990) (similarly defining "institution" and "school"). Moreover, a "facility" can be commonly defined as "something created to serve a particular function," such as "a new mental health *facility*." Webster's II, New Riverside University Dictionary 460 (1994) (emphasis in original); *cf.* Black's

Law Dictionary 591 (6th ed. 1990) (similarly defining "facility").

These common definitions comport almost precisely with Nevada's definition of a private school as a private "institution," which excludes an exempted private home. NRS 394.103 (1997). Under these common definitions, such a home is neither a "school," a "facility," an "institution," an "established organization," nor something created to serve the "particular function" of education. We do not offer this analysis to suggest, and we do not hold, that a State can *never* define "private school" broadly enough to include home education within the sphere of IDEA-benefitted educational environments. We merely conclude that the plain language does not *compel* such a broad definition.

Second, we look to the interpretation embraced by the policy letter issued by OSEP, which is charged with implementing and enforcing the IDEA. *See 20 U.S.C. § 1402*(a) (2000). According to OSEP, the "determination of whether a home education constitutes private school placement must be made on the basis of state law." OSEP Policy Letter to Williams, 18 IDELR 742, 744. The Supreme Court has taken guidance from an OSEP policy letter, as we do today, to define an ambiguous provision of the IDEA. *See Honig v. Doe, 484 U.S. 305, 325 n.8, 98 L. Ed. 2d 686, 108 S. Ct. 592 (1988); see also Mary P. v. Illinois State Bd. of Educ., 919 F. Supp. 1173, 1179 (N.D. Ill. 1996).*

Third, Congress explicitly ratified OSEP's view that States must define the ambit of "private schools." Specifically, the amended IDEA provides *inter alia* that "the term 'elementary school' means a nonprofit institutional day or residential school that provides elementary education, *as determined under State law*." *20 U.S.C. § 1401*(5) (2000) (emphasis added). Elsewhere, the new IDEA's definition of

"secondary school" is likewise committed to "State law." *20 U.S.C. § 1401*(23) (2000).

"When a Congress that re-enacts a statute voices its approval of an administrative or other interpretation thereof, Congress is treated as having adopted that interpretation." *United States v. Sheffield Bd. of Comm'rs, 435 U.S. 110, 134, 55 L. Ed. 2d 148, 98 S. Ct. 965 (1978); see also Ward v. Commissioner, 784 F.2d 1424, 1430 (9th Cir. 1986)* (describing "legislative reenactment doctrine"). Here, Congress went further than merely silently reenacting the IDEA or tacitly consenting to OSEP's deference to the States; Congress expressly embraced such deference to the States.

[*1041] Contrary to the contentions of the appellants, leaving such discretion to the States does not clash with Congressional intent. The appellants rely on Congressional findings contained within the IDEA, providing that "state and local educational agencies have a responsibility to provide education for all children with disabilities." *20 U.S.C. § 1400*(b)(8) (1996); *accord 20 U.S.C. § 1400*(c)(6) (2000). The school district has not failed in its "responsibility to provide *education* for" Christopher, *id.* (emphasis added); indeed, the school district has offered free enrollment in the public school, replete with subsidized special services. *Cf. Irving Independent School Dist. v. Tatro, 468 U.S. 883, 890, 82 L. Ed. 2d 664, 104 S. Ct. 3371 (1984)* (By enacting the IDEA, "Congress sought primarily to make public education available to handicapped children and to make access meaningful.") (internal quotation marks and citation omitted). Nothing in the IDEA requires that school districts provide services to children whose parents have rejected the State's offer of an education and have failed to enroll in any "school," under the State's definition of that word.

Nevada's 1999 legislation providing for speech therapy for home-educated students is but additional evidence that

federal courts need not strain to capture this subject from the States. On this issue, we affirm the district court.

IV. Section 1983 Claims

The Hooks family also brings suit under *42 U.S.C. § 1983* and contends that the school district's policy violates equal protection and due process principles implicated by the Fourteenth Amendment of our Constitution. We reject these claims as well, because the challenged regulatory scheme does not regard a suspect classification, impinge upon a fundamental right, or fail to bear a rational relationship to a legitimate governmental purpose.

To withstand Fourteenth Amendment scrutiny, a regulation must bear only a rational relation to a legitimate governmental purpose, unless the regulation implicates a fundamental right or an inherently suspect classification. *See City of New Orleans v. Dukes, 427 U.S. 297, 303, 49 L. Ed. 2d 511, 96 S. Ct. 2513 (1976)* (per curiam) (regarding equal protection); *Richardson v. City and County of Honolulu, 124 F.3d 1150, 1162 (9th Cir. 1997), cert. denied, 525 U.S. 871, 119 S. Ct. 168, 142 L. Ed. 2d 137 (1998)* (regarding due process). Children educated at home do not comprise a suspect class, so we address in turn whether the regulatory scheme infringes on a fundamental right or lacks a rational basis. *See J.B. v. Washington County, 127 F.3d 919, 931 (10th Cir. 1997)* (holding that home-educated children do not comprise a suspect class); *cf. KDM v. Reedsport School Dist., 196 F.3d 1046, 1051 (9th Cir. 1999)* ("parochial school students are not a suspect class").

A. Due Process

Addressing the first of these issues, we hold that the regulatory scheme does not unconstitutionally infringe on the

parents' liberty interest in directing Christopher's education. Subject to "reasonable government regulation," *Runyon v. McCrary, 427 U.S. 160, 178, 49 L. Ed. 2d 415, 96 S. Ct. 2586 (1976)* (citations omitted), the Due Process Clause of the Fourteenth Amendment does protect the "liberty of parents and guardians to direct the upbringing and education of children under their control." *Pierce v. Society of Sisters, 268 U.S. 510, 534-535, 69 L. Ed. 1070, 45 S. Ct. 571 (1925)* (striking down compulsory education law); *see also Troxel v. Granville, 147 L. Ed. 2d 49, 120 S. Ct. 2054, 2060 (2000); Wisconsin v. Yoder, 406 U.S. 205, 32 L. Ed. 2d 15, 92 S. Ct. 1526 (1972); Meyer v. Nebraska, 262 U.S. 390, 399, 67 L. Ed. 1042, 43 S. Ct. 625 (1922).* This right is among those that have often been classified as "substantive due process." *E.g., Troxel, 120 S. Ct. at 2065* (Souter, J., concurring) (citation omitted). Although we avoid giving currency to the anomalous conflation of substance and process, we acknowledge that **[*1042]** some liberties have been deemed so fundamental that the only process of law that would suffice as "*due* process of law" for their derogation would be amending the Constitution. *See* U.S. Const. amend. VIX, § 1. ("nor shall any State deprive any person of ... liberty ... without due process of law. ").

Courts outside our Circuit have applied the *Pierce* parental liberty to a right of parents to educate their children at home, and these courts have held that any such right is subject to reasonable regulation. *See, e.g., Murphy v. Arkansas, 852 F.2d 1039, 1044 (8th Cir. 1988); Clonlara, Inc. v. Runkel, 722 F. Supp. 1442, 1458 (E.D. Mich. 1989); People v. Bennett, 442 Mich. 316, 327, 501 N.W.2d 106 (1993); State v. DeLaBruere, 154 Vt. 237, 577 A.2d 254 (1990); In re Charles, 399 Mass. 324, 504 N.E.2d 592 (1987).* As these cases suggest, identifying a general parental right is far different than concluding that it has been infringed.

We locate no infringement here. The school district's policy does not prohibit the Hooks family's desired educational option - indeed, Christopher currently and legally receives his education at home. The school district's policy, in accordance with pre-1999 Nevada law, merely requires that certain benefits attached to school attendance be in fact attached to "school" attendance.

A recent case in the Tenth Circuit concerned a similar issue. In *Swanson v. Guthrie Independent School Dist. 1-L, 135 F.3d 694, 699-700 (10th Cir. 1998),* our sister Circuit held that a school district's refusal to allow a home-educated child to attend classes part-time did not infringe on the parents' right to direct their child's education. The *Swanson* court held that parents had no constitutional right "to send their children to public school on a part-time basis, and to pick and choose which courses their children will take from the public school." *Id. at 700.* As in *Swanson*, the Hooks family does not have the right to "pick and choose" the services offered by the school district.

Parents in Nevada who teach their children at home pursuant to the NRS 392.070 home-education exemption are not subject to the same educational and institutional controls that guide educators in institutional private schools or public schools. For example, a "private school" in Nevada is considered a "place of public accommodation," and thus is subject to expanded legal obligations. *See* NRS 651.050(2)(k); *cf. Clark County School Dist. v. Buchanan, 112 Nev. 1146, 924 P.2d 716 (1996)* (requiring institutional school to admit helping dogs). "Private schools" are required to have a license. *See* NRS 394.075 (1997) (defining "license"); NRS 394.251 (1997) (license requirement). Furthermore, "instruction in the subjects required by law for pupils in the public schools shall be required of pupils receiving instruction in such private schools." NRS 394.130 (1997).

Under the circumstances of this case, attaching receipt of IDEA services to institutional school attendance, and fulfillment of the according regulatory requirements, constitutes "reasonable government regulation" that does not offend our Constitution. *Runyon, 427 U.S. at 178.* Put differently, even if the parents have a constitutional right to educate Christopher at home, they do not have a constitutional right to state-funded speech therapy services.

B. Equal Protection

When neither a fundamental right nor a suspect classification is implicated, a classification "must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis" for it. *Heller v. Doe, 509 U.S. 312, 320, 125 L. Ed. 2d 257, 113 S. Ct. 2637 (1993)* (citations omitted). The drafters need not actually articulate this basis. *See id.* (citations omitted).

The appellants challenge two separate governmental directives: (1) the school district's policy denying services to home-educated **[*1043]** children, and (2) the IDEA's delegation to States of the power to make such a denial. Both offer rational bases and thereby survive equal protection challenge.

Nevada and its school districts have a legitimate interest in promoting educational environments that fulfill those qualifications that the State deems important. Limiting IDEA services to qualified "private schools" reasonably advances that interest by steering scarce educational resources toward those qualified educational environments.[1] *Cf. Murphy v.*

---

[1] Nothing here is meant to suggest that the *Pierce* parental right warrants only rational-basis review. The "reasonable government regulation," *Runyon, 427 U.S. at 178,* to which the right is subject might not include every regulation that is rationally related to some legitimate gov-

Arkansas, 852 F.2d at 1044 (holding that Arkansas's regulation of home education, but not private schools, was rationally related to State's interest in insuring that its citizens were being properly educated). Moreover and relatedly, school districts also have a legitimate interest in maximizing the utility of scarce funds. This interest is likewise reasonably advanced by limiting services to those environments that are regulated, monitored, and which might offer beneficial economies of scale.

State discretion under the IDEA to define "private schools" also has a rational basis. The appellants contend that even if the school district's policy is constitutional, the IDEA's deference to States on this matter offends rationality by creating haphazard patchwork in which the provision of IDEA benefits varies from state to state. We see no need to rend this patchwork. Indeed, the very complexity of regulatory schemes surrounding state education counsels in favor of Congress leaving some definitional matters to the States.

The Supreme Court has recognized that education is an area "where States have historically been sovereign," *United States v. Lopez, 514 U.S. 549, 564, 131 L. Ed. 2d 626, 115 S. Ct. 1624 (1995),* and the IDEA advances a legitimate purpose by preserving some of that sovereignty. Neither the Constitution nor the IDEA abrogates the IDEA's preservation of a portion of the "deeply rooted tradition of state and local control over education." *Bennett v. New Jersey, 470 U.S. 632, 634, 84 L. Ed. 2d 572, 105 S. Ct. 1555 (1985).* In rejecting the appellants' constitutional challenges, we affirm the district court.

CONCLUSION

---

ernmental interest. We leave resolution of this issue to a future case that necessitates it.

We hold that, pursuant to the IDEA, States have discretion to determine whether home education constitutes an IDEA-qualifying educational environment. We also hold that the school district's policy of limiting IDEA funds to institutional schools does not unconstitutionally offend equal protection principles or infringe on the parents' liberty interest in guiding their child's education. We remand to district court so that it may dispose of this case in accord with this opinion and with new Nevada law.

Accordingly, we AFFIRM in part and REMAND.

APPENDIX B:
CIRCUIT COURT OPINION DENYING REHEARING

WILLIAM and CATHERINE HOOKS, individually and as parents and natural guardians of CHRISTOPHER HOOKS, a minor, Plaintiffs-Appellants, v. CLARK COUNTY SCHOOL DISTRICT and BRIAN CRAM, in his official capacity as Superintendent of the Clark County School District, Defendants-Appellees.

No. 98-17271

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

November 2, 2000, Filed

NOT FOR PUBLICATION

Before: GOODWIN, BRUNETTI, and THOMAS, Circuit Judges.

The panel has voted unanimously to deny the petition for rehearing. Judge Thomas has voted to deny the petition for rehearing en banc, and Judges Goodwin and Brunetti recommended denial.

The full court has been advised of the petition for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is DENIED and the petition for rehearing en banc is DENIED.

APPENDIX C:
DISTRICT COURT OPINION GRANTING SUMMARY JUDGMENT TO RESPONDENTS

WILLIAM and CATHERINE HOOKS, individually and as parents and natural guardians of CHRISTOPHER HOOKS, a minor, Plaintiffs-Appellants, v. CLARK COUNTY SCHOOL DISTRICT and BRIAN CRAM, in his official capacity as Superintendent of the Clark County School District, Defendants-Appellees.

No. 98-17271

UNITED STATES DISTRICT COURT FOR THE FEDERAL DISTRICT OF NEVADA

Date?, Filed

NOT FOR PUBLICATION

Before the court is a motion (#9) to dismiss under Federal Rule of Civil Procedure 12(b)(6) submitted by defendants Clark County School District ("CCSD") and Brian Cram, in his official capacity as Superintendent of CCSD. Plaintiffs have opposed (#15) and defendants have replied (#17).

I. FACTUAL BACKGROUND

Christopher Hooks is an 11 year-old child. Complaint ¶8. He is being educated at home by his parents, William and Catherine Hooks, in accordance with Nev. Rev. Stat. Ann. § 392.070. *Id.* Section 392.070 provides that mandatory attendance in public schools is excused "when satisfactory written evidence is presented to the board of trustees of the school district in which the child resides that the child is receiving at home or in some other school equivalent instruction of the kind and amount approved by the state board of education." N.R.S. § 392.070. Since the 1994-95 school year, the Hookses have applied for and been granted an exemption from mandatory attendance at public school in Nevada. See Motion, Exh. A.

On August 27, 1996, Christopher was assessed and determined to be eligible for speech therapy services in the CCSD based on criteria in the Nevada Administrative Code. Complaint ¶ 9. The Hookses requested that the CCSD provide speech therapy services to Christopher even though he was not enrolled in the CCSD. On March 13, 1997, the CCSD sent a letter to the Hookses stating that it would not provide such services because, pursuant to CCSD Policy 5111(IV), students who are exempted, such as Christopher, "'do not have access to instruction and/or ancillary services with the public schools.'" Opp., Exh. A (March 13, 1997 letter quoting Policy 4111(IV)). In response to this letter, the Hookses requested a due process hearing pursuant to Nevada Administrative Code section 388.3000. By letter on June 27, 1997, the CCSD denied this request by suggested that the Hookses could either seek an exception to Policy 5111 from the Board of Trustees to address Christopher's individual needs or enroll him in the CCSD and an individualized education plan would be developed to suit his needs. See Opp.,

Exh. B (June 27, 1997 letter). The Nevada Department of Education ("NDOE") previously advised the Hookses that they were not entitled to a due process hearing whether the shool district erred in failing to offer any services to the child, but that they could file a complaint with NDOE. See Opp., Exh. C (June 5, 1997 letter).

On June 30, 1997, the Hookses filed a complaint with the NDOE regarding the CCSD's refusal to provide speech therapy services to Christopher. Complaint ¶ 11. On August 27, 1997, the NDOE determined that the CCSD had not violated any federal regulations by declining to provide special education and related services to students being educated under the home instruction exemption. Motion, Exh. C. The NDOE decision relied on a 1992 opinion from the Office of Special Education Programs ("OSEP"). See Motion, Exh. E. The OSEP letter states in pertinent part:

> Under [34 C.F.R. § 300.403 and 34 C.F.R. § 300.452], public agencies shall make special education and related services available to children with disabilities who have been enrolled by their parents in private schools or facilities. Part B, however, does not define the term "private school or facility." Consequently, the determination of whether a particular home education arrangement constitutes the enrollment of the child with a disability in a private school or facility must be based on state law. If, under the law of your state, home education constitutes enrollment in a private school or facility, then the requirements of 34 C.F. R. § 300.403 and 34 C.F.R. § 300.452 would apply.

Because the definition of "private schools" in N.R.S. § 394.103 expressly excludes "a home in which instruction is provided to a child excused from compulsory attendance pursuant to N.R.S. § 392.070," the NDOE concluded that the CCSD was not required to provide special education or related services to home-schooled children such as Christopher. The NDOE decision also informed the Hooks that they were entitled to seek a review of NDOE's decision with the United States Secretary of Education under 34 C.F.R. § 300.661. *Id.* The Hooks do not allege that they sought a review by the Secretary of Education in their complaint.

On January 9, 1998, plaintiffs William and Catherine Hooks, individually and on behalf of their minor son Christopher, filed a complaint alleging that the CCSD's conduct violated the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400 *et seq.*, as well as Nev. Admin. Code §§ 388.215, 388.405(1), and 388.093, and N.R.S. § 388.440(2). Further, plaintiffs' complaint alleges a cause of action under 42 U.S.C. § 1983 based on violation of their fundamental right to direct their child's education under the Fourteenth Amendment of the United States Constitution. Plaintiffs seek declaratory relief that Christopher is entitled to receive speech and language services from CCSD, an order requiring the CCSD to provide such services, reimbursement of the cost of private speech and language services provided to Christopher from August 27, 1997 and reasonable attorneys' fees pursuant to 20 U.S.C. § 1415(i) and 42 U.S.C. § 1988.

II. ANALYSIS

A. CONVERSION OF A MOTION TO DISMISS INTO A SUMMARY JUDGMENT MOTION

In considering a motion to dismiss brought pursuant to Federal Rule of Civil Procedure 12(b)(6), the court cannot consider material outside of the complaint. *Levine v. Diamanthuset, Inc.*, 950 F.2d 1478 (9th Cir. 1991), overruled on other grounds by *Central Bank of Denver, N.A., v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994). Where material outside of the complaint is presented as part of a motion to dismiss, the court has the discretion either to reject such evidence or to consider such evidence and convert the motion to dismiss into a summary judgment motion. Fed. R. Civ. P. 12(b); *Skyberg v. United Food & Commercial Workers Int'l Union*, 5 F.3d 297, 302 n. 2 (8th Cir. 1993). The opposing party must be made aware of the court's election to treat the 12(b)(6) motion as converted and must be given a reasonable opportunity to present rebutting evidence. Fed. R. Civ. P. 12(b); *Portland Retail Druggists Ass'n v. Kaiser Foundation Health Plan,* 662 F.2d 641, 645 (9th Cir. 1981). The court need not issue a formal order converting the motion into a summary judgment motion but the record must show that the opposing party was fairly apprised that the court would look beyond the pleadings and treat the motion as one for summary judgment. See *Song v. Ciry of Elyria, Ohio*, 985 F.2d 840 (6th Cir. 1993) (no surprise when both parties had submitted extrinsic evidence and the court took months to grant the motion). In this case, both parties have submitted evidence outside of the pleadings in briefing defendants' motion. Thus, the court will treat defendants' motion as a motion for summary judgment.

B. SUMMARY JUDGMENT STANDARD

Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The burden of demonstrating the absence of a genuine issue of material fact lies with the moving party, *Zoslaw v. MCA Distr. Corp.*, 693 F.2d 870, 883 (9th Cir. 1982), and for this purpose, the material lodged by the moving party must be viewed in the light most favorable to the nonmoving party. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970); *Baker v. Centennial Ins. Co.*, 970 F.2d 660, 662 (9th Cir. 1992). A material issue of fact is one that affects the outcome of the litigation and requires a trial to resolve the differing versions of the truth. *S.E.C. v. Seaboard Corp.*, 677 F.2d 1301, 1306 (9th Cir. 1982).

Once the moving party presents evidence that would call for judgment as a matter of law at trial if left uncontroverted, the respondent must show by specific facts the existence of a genuine issue for trail. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986).

> [T]here is no genuine issue of fact for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted.

Id. at 249-50 (citations omitted). "A mere scintilla of evidence will not do, for a jury is permitted to draw only those inferences of which the evidence is reasonably susceptible; it may not resort to speculation." *British Airways*

Board v. Boeing Co., 585 F.2d 946, 952 (9th Cir. 1978). Moreover, if the factual context makes the nonmoving party's claim implausible, that party must come forward with more persuasive evidence than otherwise would be necessary to show there is a genuine issue for trial. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *California Architectural Bldg. Products, Inc. v. Franciscan Ceramics, Inc.*, 818 F.2d 1466, 1468 (9th Cir. 1987).

C. EXHAUSTION OF ADMINISTRATIVE REMEDIES

Defendants contend that plaintiffs have failed to exhaust their administrative remedies because they did not appeal the NDOE's decision to the United States Secretary of Education pursuant to C.F.R. § 300.661(d). See Motion at 9. Although the Ninth Circuit has not directly addressed this issue,[2] at least two circuits have held that an appeal of a state agency's decision to the Secretary of Educaiton is not required to exhaust administrative remedies for a section f1983 action based on alleged IDEA violations. *Jeremy H. by Hunter v. Mount Lebanon School Dist.*, 95 F.3d 272, 282-83 & nn. 19 & 20 (3rd Cir. 1996) (finding that complaint procedures established in C.F.R. §§ 300.660-300.662 are elective and not mandatory for plaintiffs seeking relief under IDEA

---

[2] In *Hoeft v. Tucson Unified School Dist.*, 967 F.2d 1298 (9th Cir. 1992), the Ninth Circuit suggested in dicta that a plaintiff might exhaust the Education Department General Administrative Regulations ("EDGAR") procedures, a regulatory forerunner of current C.F.R. § 300.660-300.662, as a substitute for exhausting IDEA procedures in cases challenging facially invalid policies but did not indicate that exhaustion of EDGAR remedies was required where plaintiffs had already exhausted IDEA procedures. See *id.* at 1308 ("Whether to require or to accept exhaustion of the EDGAR procedure as a substitute for exhausting IDEA procedures in challenges to facially invalid policies, however, is a determination which must be made on a case-by-case basis").

directly or through a section 1983 claim); *Mrs. W. v. Tirozzi*, 832 F.2d 748, 757-58 (2nd Cir. 1987) (finding appeal to the Secretary of Education was not required to exhaust administrative remedies under the Education of the Handicapped Act ("EHA"), a predecessor to the IDEA, because the Secretary's authority is limited to withholding federal funding from a state found to be in noncompliance with federal law and such a remedy is contrary to the interests of plaintiffs). Persuaded by this authority, the court finds that plaintiffs' claim are not barred by their failure to appeal the NDOE's decision to the United States Secretary of Education.

D. VIOLATIONS OF THE IDEA

Plaintiffs' complaint alleges that the CCSD violated its obligation under the IDEA to provide Christopher with special education services. Plaintiffs appear to be relying on 20 U.S.C. § 1412(a)(10)(A) and 34 C.F.R. §§ 300.403 and 300.452 as the source for CCSD's duty to provide such services to Christopher.

Section 1412(a)(10)(A) provides in pertinent part:

> Children enrolled in private schools by their parents. (i) In general. To the extent consistent with the number and location of children with disabilities in the State who are enrolled by their parents in private elementary and secondary schools, provision is made for the participation of those children in the program assisted and carried out under this part [20 U.S.C. §§ 1411 et seq.] by providing for such children special education and related services in accordance with the following requirements...

(I) Amounts expended for the provision of those services by a local educational agency shall be equal to a proportionate amount of Federal funds made available under this part. [20 U.S.C. §§ 1411 et seq.].

(II) Such services may be provided to children with disabilities on the premises of private, including parochial, schools, to the extent consistent with law.

In addition, the relevant regulations state:

> If a child with a disability has [a free appropriate public education] available and the parents choose to place the child in a private school or facility. However, the public agency shall make services available to the child as provided under §§300.450-300.452.

34 C.F.R. § 300.403(a).

> Each [local educational agency] shall provide special education and related services designed to meet the needs of private school children with disabilities residing in the jurisdiction of the agency.

34 C.F.R. § 300.452(a).

Defendants rely on an OSEP policy letter and Nevada law to argue that the CCSD's policy of refusing to provide home educated students (who are exempted from public school attendance) with access to instruction and/or ancillary services, including special education services, within the public schools does not violate the IDEA or its accompanying regulations. On January 22, 1992, the OSEP, the agency charged with monitoring and enforcing the IDEA, wrote a policy letter responding to an inquiry about whether students

with disabilities who are being home educated are covered by the terms of 34 C.F.R. §§ 300.403 and 300.452. It states in relevant part:

> Under these provisions, public agencies shall make special education and related services available to children with disabilities who have been enrolled by their parents in private schools or facilities. Part B, however, does not define the term "private school or facility." Consequently, the determination of whether a particular home education arrangement constitutes the enrollment of a child with a disability in a private school or facility must be based on State law. If, under the law of your State, home education constitutes enrollment in a private school or facility, then the requirements of 34 C.F.R. § 300.403 and § 300.452 would apply.

U.S. Dept. of Education, Office of Special Education Programs, Letter to Williams, 18 IDELR 742 (Jan. 22, 1992). Nevada statutory law defining the term "private schools" expressly excludes "a home in which instruction is provided to a child excused from compulsory attendance pursuant to NRS § 392.070." N.R.S. Thus, defendants contend that 34 C.F.R. §§ 300.403 and 300.452 have no application to situations where, as here, parents of a disabled child have chosen to educate him or her at home.

Although plaintiffs challenge defendants' reliance on the OSEP's policy letter interpreting regulations promulgated under the IDEA, the Supreme Court has sought guidance from OSEP policy letter where, as here, the meaning of a term or phrase in the EHA, a predecessor to the IDEA, is ambiguous. See *Honig v. Doe*, 484 U.S. 305, 326 n.8 (1988) (where EHA failed to define the phrase "changed in placement" and neither the statute's structure nor legislative history provided any guidance, the Supreme Court "defer[red]

to the construction adopted by [OSEP,] the agency charged with monitoring and enforcing the statute"); see also *Magyar v. Tucson Unified School Dist.*, 958 F.Supp. 1423, 1439-40 (D.Ariz. 1997) (following *Honig's* decision to defer to the OSEP's interpretation); Mary P. v. Illinois State Bd of Educ., 919 F.Supp. 1173, 1179 (N.D. Ill. 1996) ("the court will defer to the OSEP's interpretive letter unless it violates the clear meaning or purpose of the statute, the regulation, or applicable legal precedents").

Plaintiffs contend that the court should disregard the OSEP's interpretation of IDEA regulations in this case because it clashes with the IDEA's purpose of ensuring that *all* children with disabilities are provided a free appropriate public education, including special education and related services, and because following OSEP's interpretation results in a "crazy quilt" approach to the provision of special education services to non-public school students across the country. However, certain IDEA provisions and regulations demonstrate that there are limits to the funding and services which must be provided to children with disabilities whose parents unilaterally remove them from public schools. For example, when such children are placed in private schools by their parents even though a free appropriate public education is available to them in the public schools, 34 C.F.R. § 300.403 provides that the state and local educational agencies are *not* required to pay for their education at private schools. Moreover, even though the state and local educational agencies are charged with providing special education services to such children, those services must be provided only "[t]o the extent consistent with the number and location of [private school] children with disabilities in the State." See 20 U.S.C. § 1412(a)(10); 34 C.F.R. § 300.451. Such limiting language suggests that a state or local education agency may elect not to serve every private school child with

a disability residing in its jurisdiction, a position adopted by the OSEP, even though such agencies must serve all disabled children attending public schools. See U.S. Dept of Education, Office of Special Education Programs, Letter to Anonymous, 23 IDELR 650 (July 28, 1995). Because the IDEA does not, in fact, provide the same rights to *all* children with disabilities, the OSEP's position that state law governs the provision of special education services to disabled children educated at home is not contrary to the IDEA's purpose.

Accordingly, the court finds that the CCSD's policy, in accordance with OSEP's interpretation and Nevada law, of declining to provide disabled children educated at home with access to special education services does not violate the IDEA. Thus, defendants are entitled to summary judgement on plaintiffs' IDEA claims.

E. CONSTITUTIONAL VIOLATIONS

Plaintiffs also challenge CCSD's policy under the Equal Protection Clause of the Fourteenth Amendment and argue that it should be subject to strict scrutiny because the classification between home educated children and all other children infringes on the constitutional right of parents to direct the education of their children. The Tenth Circuit recently recognized the limited scope of this constitutional right when it considered the constitutionality of a public school district's refusal to allow a home-schooled child to attend classes part-time. *See Swanson By and Through Swanson v. Guthrie Independent School Dist. No. I-L*, 135 F.3d 694, 699-700 (10th Cir. 1998) In *Swanson*, the court acknowledged that parents have a constitutional right to direct the education of their child but discussed numerous cases establishing "that parents simply do not have a constitutional right to each and every aspect of their children' education and oust the state's

authority over that subject."[3] *Id.* 699. The court rejected the parents' claim that they had a constitutional right to send their home-schooled child to public school on a part-time basis, and to pick and choose among the courses offered by the public school. *Id.* at 700, 702. Because the school district's part-time attendance did not interfere with a fundamental constitutional right, the court did not apply strict scrutiny to the policy. *Id.* Further, in dicta, the court found that the policy satisfied the lesser standard of rational review because attempting to maximize state funding is a legitimate government interests and limiting part-time attendance is a reasonable means of accomplishing that goal. *Id.* at 700 n. 8.

Like the parents of the home-schooled child in *Swanson* who sought to pick and choose among the courses offered by the public school, plaintiffs in this case seek to pick and choose among the services offered by the CCSD. They do not want their child to attend public school full-time and receive instruction in academic subjects as well as opportunities to participate in non-academic activities. Yet, at the same time, they wish to have their child receives the benefits of speech therapy services offered in public schools. Following the rational in *Swanson*, plaintiffs constitutional right to direct their child's education simply does not extend to picking and choosing among CCSD's services and, thus, the strict scrutiny test does not apply. Although defendants do not offer any explanation for the CCSD policy in their opposition brief, it is clear that such a policy is a reasonable mean of accomplishing such legitimate governmental goals as allo-

---

[3] One case cited in *Swanson, Murphy v. State of Arkansas*, 852 F.2nd 1039 (8th Cir. 1988), illustrates that even parents of home-schooled children cannot control all aspects of the education of their children. *Murphy* held that home-schooled children may be subjected to standardized testing to asses the quality of education the children are receiving despite the objections of their parents. *Id* at 1043-44.

cating scarce resources in a manner beneficial to the greatest number of students and keeping administrative costs at a minimum. See, e.g. *Swanson*, 135 F.3d. at 700 & n.5 (recognizing school district's legitimate interest in allocation scarce resources and attempting to maximize state funding available).

Plaintiffs also argue that CCSD's policy is improper because the government may not condition the receipt of a benefit upon the giving up of a constitutional right. They assert that the only way to obtain speech therapy services for their child at public expense is either enroll him in public school or perhaps at a traditional private school and that this condition on receiving benefits guaranteed by the IDEA interferes with plaintiffs' constitutional right to direct the education of their child. Because the court has determined that plaintiffs' constitutional right to direct the education of their child is limited in scope such that they cannot seek to embrace some of the CCSD's services and reject others, there is no constitutional right with which CCSD's policy interferes.

Thus, defendants are also entitled to summary judgement on plaintiffs' constitutional claims.

F. PENDANT STATE LAW CLAIMS

As for plaintiffs' state law supplemental claims, the court declines to exercise jurisdiction over them, having found that defendants are entitled to summary judgement on the original jurisdiction claims. 28 U.S.C. § 1367(c)(3); see also *Moore v. Package Express, Inc.*, 885 F.2d 531, 533 (9th Cir. 1989) ("Nor did the district court err in dismissing the pendent state claims against the accountant, lawyer and stockbroker defendants once the court had dismissed the federal [securities] claim on which federal jurisdiction was predicated."); *McCarthy v. Mayo*, 827 F2d 1310, 1317 (9th Cir

1987) (it is generally better to dismiss pendent state claims after federal claims have been dismissed).

III. CONCLUSION

Accordingly, **IT IS ORDERED** that defendants' motion (#9) for summary judgement be GRANTED. The Clerk shall enter judgement accordingly.

APPENDIX D:
OSEP LETTER

18 IDELR 742 (JAN. 22, 1992)

Text of Inquiry

I am writing in reference to an article in "Education of the Handicapped," January 3, 1990, which stated that:

> A district is not required to provide services for all children with handicaps enrolled in private schools, nor is a (district) required to provide the full range of services required by (P.L. 94-142) ... to such children," Schrag wrote.

It was my understanding that EHA Regulation 300.452 required local educational agencies to provide special education and related services designed to meet the needs of private school handicapped children residing in the jurisdiction of the agency. Would you clarify for me which handicapped children enrolled in private schools a district is not required to provide services for, and which of the full range of services required by P.L. 94-142 need not be provided to such children?

In the same article you were also quoted as saying that, "it would not be appropriate ... to refuse to provide speech therapy and transportation to private school children with handicaps solely on the grounds that it did not use (P.L. 94-142) funds for these aspects of its special education program." Again, would you clarify when it would ever be ap-

propriate for a school district to refuse to provide special education services to private school children with handicaps?

Our schools are also receiving requests for special education services for children who are being home educated. Would EHA Regulations 300.403 and 300.452 apply to these children also?

Text of Response

This letter is in response to your correspondence dated February 14, 1991, concerning the obligation of public agencies to serve children with disabilities who have been enrolled by their parents in private schools or facilities. Your letter posed three specific questions regarding this requirement. Before answering those specific questions, it would be helpful to set out the basic obligation public agencies have towards children with disabilities enrolled by their parents in private schools or facilities.

Under Part B of the Individuals with Disabilities Education Act (Part B), 20 U.S.C. § 1401, 1411-1420, State educational agencies (SEAs) are required to ensure that "[t]o the extent consistent with their number and location in that State, provision is made for the participation of ... [children with disabilities enrolled by their parents in private schools] ... in the program assisted or carried out under this part by providing them with special education and related services." 34 CFR § 300.451(a). In meeting this requirement, public agencies must provide such students with a "genuine opportunity for equitable participation" in the program they carry out under Part B. *See* 34 CFR § 76.651(a)(1) of the Education Department General Administrative Regulations (EDGAR), which is incorporated by reference into the Part B regulation at 34 CFR § 300.451(b). In determining the ex-

tent of this participation, school districts are obligated to consult with representatives of students enrolled in private schools when considering which of those students with disabilities will receive services, and how those services will be provided. *See* 34 CFR § 76.652 and 34 CFR § 300.451(b). The special education and related services provided by school districts to private school students with disabilities must be comparable in quality, scope, and opportunity for participation to those services provided for students enrolled in public schools. *See* 34 CFR § 76.654(a) and 34 CFR § 300.451 (b).

In your first question you asked us to clarify which children with disabilities, who have been enrolled by their parents in private schools, do not have to be provided with special education and related services by the local educational agency in which they reside. The assumption underlying this question that Section 613(a)(4)(A), 20 U.S.C. § 1413(as)(4)(A), of Part B does not provide children enrolled by their parents in private schools or facilities with an individual entitlement to receive special education and related services, is correct. The Secretary, in response to public comment on the proposed by-pass regulations, explained that:

> Section 613(a)(4)(A) only imposes an obligation on Stat4es to provide for the participation of handicapped private school children in the program carried out pursuant to the EHA-B and does not require that services be provided to each and every private school handicapped child. Moreover, Section 613(a)(4)(A) allows for consideration of the number and location of private school handicapped children in the State in providing services to those children.

> The Secretary views Section 613(a)(4)(A) as providing States and the Secretary with the discretion to devise, in consultation with private school representatives, the most efficient scheme possible for providing adequate special education and related services to a number of, but not necessarily all, private school handicapped children. This interpretation has been consistently followed by the Department, and applied to States, under the original regulation for EHA-B (45 CFR § 121a.451-121a.460 (1977) and under the [Education Department General Administrative Regulations] EDGAR provisions which replaced them in 1980.

49 *Fed. Reg.* 48522 (December 12, 1984). The Department's regulations do not establish a specific criterion or formula for determining which of the children with disabilities enrolled by their parents in private schools or facilities should be provided with special education and related services. Rather, those regulations establish a process, involving consultation with private school representatives, for the purpose of determining, among other things, which children with disabilities enrolled by their parents in private schools or facilities should be served. Consequently, school districts must follow this process in order to determine which of these children will be provided with special education and related services.

Another component of your first question asks which special educational and related services must be provided to children with disabilities enrolled by their parents in private schools or facilities. Children with disabilities, who have been offered a free appropriate public education, but have been enrolled by their parents in a private school or facility, are not entitled to have their education at that private school

or facility paid for by a public agency. Those children, however, must have special educational and related services made available to them by the public agency. 34 CFR 300.403(a). The Department's regulations do not contain educational and related services that are to be made available to these children. Instead, the types of special education and related services that a school district provides to these students will be determined through the process, noted above, of consultation by the public agency with representatives of the private school students, and the preparation of an individualized education program for those private school students whom it is determined will be served. 34 CFR § 300.348.

In your second question you ask when would it be appropriate for a school district to refuse to provide services to a child with disabilities enrolled by their parents in private school. As noted before, Section 613(a)(4)(A) of Part B does not provide an individual entitlement to these children to receive special education and related services. School districts, however, do not have unlimited discretion to refuse to provide special education and relates services to particular students. That determination is made through a process of consultation with representatives of the private school students. Therefore, although local education agencies are not required to serve all children with disabilities placed in private school by their parents, they must develop an equitable method, using the process set forth in 34 CFR Part 76, to determine which students will be served.

Your third question asks whether students with disabilities who are being home educated are covered by the terms of 34 CFR § 300.403 and 34 CFR § 300.452. Under these provisions, public agencies shall make special education and related services available to children with disabilities who

have been enrolled by their parents in private schools or facilities. Part B, however, does not define the term "private school or facility." Consequently, the determination of whether a particular home education arrangement constitutes the enrollment of a child with a disability in a private school or facility must be based on State law. If, under the law of your State, home education constitutes enrollment in a private school or facility, then the requirements of 34 CFR § 300.403 and 34 CFR § 300.452 would apply.

I am hopeful that the information provided above is responsive to your inquiry.

Judy A. Schrag
Director
Office of Special Education Programs